

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ERLH, IJH, MCH, KSH, and KSH,
Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHAPPELLE EDWARD WILLIAMS,

Respondent-Appellant,

and

LAMONA CLAUDETTE HART, EDWARD
TURNER, and DARRELL TUCKER,

Respondents.

UNPUBLISHED

June 19, 2001

No. 226626

Wayne Circuit Court

Family Division

LC No. 96-342766

Before: McDonald, P.J., and Murphy and Meter, JJ.

McDONALD, J. (*dissenting*).

I strongly disagree with the majority's conclusion that respondent's failure to pursue "legal custody" in circuit court justified terminating his parental rights. Although the majority sets forth an adequate statement of the facts, I disagree with the weight the majority gives to the determinative facts of this case.

The conclusions of the family court are reviewed not de novo but for clear error. MCR 5.974(I); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Matter of Ovalle*, 140 Mich App 79, 82-83; 363 NW2d 731 (1985). The family court must identify the statutory basis for termination and find it supported by clear and convincing evidence. MCR 5.974(D)(3); *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). In this case, the family court based termination of respondent's rights on his failure to comply with court orders despite his children having been in foster care for four years, his late acknowledgment of the problems caused by his illness, his poor visitation record, his lack of suitable housing, and his failure to send his children

to school. Of these five reasons, three are factually incorrect. IJH and MCH were not placed in foster care until August 21, 1999; respondent's illness was admitted and in the record by September 16, 1996; and the caseworker's reports consistently described respondent's housing as "suitable." The court did not mention respondent's lack of "legal custody" at all.

The majority states that lack of custody was a condition "existing" at the time of adjudication. However, according to the petition and the family court's findings at the dispositional hearing, the conditions leading to adjudication were the mother's poor judgment, the condition of the mother's home, the mother's leaving the children with someone she knew had a habit of leaving them without supervision, and the fact that the children were left alone. Petitioner made no allegations concerning respondent, and his two children were placed in his custody on July 15, 1996, when they were taken from their mother; they could not have been so placed if respondent was not a blood relative.¹ Respondent was undisputedly the natural father of IJH and MCH. The record reveals that he was named on their birth certificates and had established paternity in the circuit court at the time of adjudication. Before the children were removed from their mother's home, respondent visited and supported them.

Thus, at the time of adjudication, September 16, 1996, respondent had both physical custody and legal control of his children, and the family court's dispositional order granted respondent custody of IJH and MCH. The issue of his "legal custody" of the children was not raised until a year later in the September 1997 report of the caseworker. It was mentioned before the court at the next three hearings, and on September 2, 1998, (eight days after the caseworker's report was written) respondent's substitute counsel stated that by then respondent had filed for custody. After that, the caseworker's report for January 1999 indicated that she had no verification that he had obtained a custody order; the caseworker had trouble contacting respondent's counsel, but she continued to recommend he pursue it. The matter was not mentioned in court after September 1998, neither in closing arguments nor in the court's concluding comments, and there is nothing in the record indicating the result of his filing. Even if something extra needed to be done to secure "legal custody," even if this was a condition *existing* at adjudication, it was not a condition that *led* to adjudication, as required by the statute. MCL 712A.19b(3)(c)(i); MCL 712A.2(b).

Furthermore, respondent did not need to pursue "legal custody" in circuit court; the family court had jurisdiction to order legal custody. MCL 600.1021; MCL 712A.2(b). Although it inexplicably declined to exercise that authority, it ultimately did not penalize respondent for the matter except to force him to jump through unnecessary procedural hoops. Petitioner, on whom the burden rests, presented no evidence proving that respondent failed to obtain his order, and the record's silence on the matter emphasizes that, for whatever reason, the family court did not consider it significant, let alone "dispositive." This Court cannot create a basis for termination that was never alleged by petitioner, was not suggested by the family court, was not supported by any evidence, and is not grounded in the statutes.

¹ At the same time, the court declined to place ERLH with respondent's mother because they were not related. Clearly, the court did not question respondent's relationship with IJH and MCH.

The majority briefly addresses the correctness of the family court's legal conclusions, which were based on factual findings it labels "misleading," although they are manifestly incorrect. The majority declines to reverse not in light of evidence supporting a statutory basis for termination but finds decisive problems in the relationship between respondent and the caseworker. Respondent testified that when the girls were taken, he was unable to gather their belongings. He said he later gave two bags of clothing to his mother to pass on to the girls, although their mother said she never received them. The caseworker noted in her June 23, 1999, report that when respondent called twice to find out about getting his children back, she "suggested that he drop off the rest of the clothing as he was only hurting the children. He hung up on this worker both times." This was apparently the only contact between the caseworker and respondent after the girls were removed from his home. Although the majority describes respondent's behavior as "hostile and antagonistic," the record reveals only that respondent was "offensive" to the caseworker on the telephone and hung up on her twice. Again, the family court did not draw any legal conclusions from these reports; the record is too brief to fuel anything but speculation upon review.

The majority concludes that respondent had the onus to seek assistance from petitioner once his children were removed. However, the statutes and court rules clearly require *petitioner* to make "reasonable efforts" to prevent removal of a child or to rectify the conditions causing removal. MCL 712A.18f(4); MCR 5.973(A)(5); see also *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991). Although the family court held that petitioner had made reasonable efforts to rectify the conditions and to reunify the family, the record shows that after the children were removed, *no* efforts were made by petitioner to help respondent correct the situation or to reunify respondent with his children, apparently because he was "offensive." No new treatment plan was offered, and respondent was given no opportunity to rectify the problems that resulted in their missing so much school. Therefore, there was no indication that respondent would likely continue to let his children stay home from school; in fact, he testified at the termination hearing that a change in his medication had kept his epilepsy (which had significantly contributed to the problem) under complete control for six months. Thus, I would find that the family court erroneously concluded that there was no reasonable likelihood the conditions would be rectified, that there was no reasonable expectation he would be able to provide proper care and custody within a reasonable time, and that the children would be harmed if they were returned to respondent's home. No statutory basis for termination was proven to exist.

I would reverse the family court's order terminating respondent's parental rights.

/s/ Gary R. McDonald